STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
(Sawyer, P.J., and Fitzgerald, Saad, JJ.)

CHRISTINA MCCAHAN,

Plaintiff/Appellant

v.

Supreme Court No. 142765
Court of Appeals No. 292379
Court of Claims No. 08-000147-MZ
(Hon. Archie C. Brown)

SAMUEL KELLY BRENNAN,

Defendant/ Appellee.

AND

UNIVERSITY OF MICHIGAN REGENTS

Defendant/Appellee.

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AMICUS CURIAE BRIEF OF THE MICHIGAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PLAINTIFF-APPELLANT CHRISTINA MCCAHAN

TABLE OF CONTENTS

INDEX OF AUTHORITIES

MICHIGAN CASES:

OUT OF STATE CASES:

STATUTES:

OTHER SOURCES:

INTEREST OF AMICUS CURIAE

The Michigan Association for Justice ("MAJ") is an organization of Michigan lawyers engaged primarily in litigation and trial work. Comprised of more than 1,500 attorneys, MAJ recognizes an obligation to assist this Court on important issues of law that would substantially affect the orderly administration of justice in the trial courts in the State of Michigan. MAJ believes that the issues presented in this case have a direct and substantial impact on the rights of Michigan citizens that have claims for injuries against the State of Michigan. For these reasons, and those stated more fully below, MAJ respectfully requests that this Court consider the points made in this brief amicus curiae.

CONCURRING STATEMENT OF FACTS

Amicus curiae MAJ adopts the Statement of Facts in Plaintiff-Appellant McCahan's Application for Leave to Appeal from the Court of Appeals' ruling and also, does not take issue with the facts as described by the Court of Appeals in its Opinion.

CONCURRING STANDARD OF REVIEW

Amicus curiae MAJ agrees that the standard of review on appeal is *de novo* for questions of statutory interpretation. See generally, *Romain v Frankenmuth Mut Ins Co,* 483 Mich 18, 25; 762 NW2d 911 (2009).

INTRODUCTION

This case turns on a question of statutory interpretation. It asks whether this Court should interpret MCL 600.6431(3) to require strict compliance with its terms in order to avoid dismissal of a personal injury claim against the State of Michigan, or alternatively, whether substantial compliance with MCL 600.6431(3) is enough to prevent a personal injury claim from being dismissed. In *Rowland v Washtenaw Co Rd Comm'n*, 477 Mich 197, 202; 731 NW2d 41 (2007), this Court held that the statutory notice provision in MCL 691.1404(1), which applies to highway defect claims against the government, requires strict adherence to its filing deadlines. In other words, failing to provide timely notice to the government under MCL 691.1404(1) mandates that a *highway defect claim* be dismissed, regardless of whether the delay in question resulted in any actual prejudice to the government in defending itself against that particular claim.

The question in this case is whether this Court's rationale in *Rowland, supra,* requiring strict compliance with the highway defect notice provision, MCL 691.1404(1), extends to other statutory notice provisions, including, more specifically, MCL 600.6431(3), which is the notice provision for personal injury and property damage claims against the State. MAJ contends that substantial compliance with MCL 600.6431(3) is sufficient to satisfy its requirements. MAJ further contends that MCL 600.6431(3) is the only notice provision under the Court of Claims Act that is applicable to personal injury and property damage claims and that MCL 600.6431(1) and (2), are not applicable to personal injury claims, contrary to Defendant-Appellees' claims in its briefing. Further, MAJ rejects Defendant-Appellee's argument that the Court of Claims' notice provisions applicable to non-personal injury claims against the State of Michigan, e.g., MCL 600.6431(1) and (2), should inform this Court's reading of MCL 600.6431(3).

Otherwise stated, MAJ disputes Defendant-Appellee's legal argument on appeal to the extent it suggests MCL 600.6431(1) and (2) apply to personal injury claims in addition to MCL 600.6431(3). Although that issue is not before the Court in this case because Plaintiff-Appellant McCahan filed a notice of the claim within 1 year of the motor vehicle accident in question, MAJ rejects the unsupported assumption by Defendant-Appellee that MCL 600.6431(1) and (2) also apply to personal injury and property damage claims. The plain, unambiguous language of MCL 600.6431 proves otherwise, as does the legislative history of that section of the Court of Claims Act. Applying the Court of Claims' notice provisions to personal injury claims serves no purpose because MCL 600.6431(3) and other statutory notice provisions under the Governmental Tort Liability Act (GTLA), MCL 691.1401, et seq, already apply to many such claims.

For those claims where notice to the State is not mandated by the GTLA, such as in negligent operation of a motor vehicle claims under MCL 691.1405, as in this case, notice of the incident is unnecessary because motor vehicle accidents involving the operation of a state-owned vehicle will not escape the attention of the State since state employees will be obligated to report such incidents at the time of the incident. Further, in motor vehicle accident claims, unlike defective highways or public buildings, there is no continuing danger to the public that must be remedied. In addition, investigation will be triggered in such cases by the employee reporting the incident to the State because a state-owned vehicle was involved and the vehicle presumably sustained some damage.

If substantial compliance satisfies any statutory notice provision in Michigan, given this Court's ruling in *Rowland, supra*, requiring strict compliance under the GTLA's notice provision for highway defect claims, it satisfies MCL 600.6431(3). Accordingly,

this Court should reverse the Court of Appeals' decision in this case, its critically flawed interpretation of MCL 600.6431(3) and its misapplication of *Rowland, supra,* to this case.

APPLICABLE LAW

MCL 600.6431(3) is a notice provision under the Court of Claims Act, which is applicable to all personal injury and property damage claims against the State of Michigan. It provides that the "[i]n all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action." In contrast, under MCL 600.6431(1), "[n]o claim shall be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the State . . . ." Unlike MCL 600.6431(1), and its corollary provision, MCL 600.6431(2), MCL 600.6431(3) is limited to personal injury and property damage claims. Unlike those provisions, MCL 600.6431(3) does not delineate the information to be provided when filing notice of the claim itself with the Court of Claims.

MCL 600.6431(1) identifies the information to be provided in the written claim or notice of intention to file a claim. It states that the claim or notice must be signed and verified under oath by the claimant. In turn, MCL 600.6431(2) provides that "[s]uch claim or notice shall designate any department, commission, board, institution, arm or agency of the state involved in connection with such claim . . . .". It also states that "a copy of such claim shall be furnished to the clerk [of the court of claims] at the time of filing of the original for transmittal to the attorney general and to each [designated State entity]."

Unlike other claims against the State of Michigan, personal injury claims are also subject to statutory notice provisions under the Governmental Tort Liability Act (GTLA), MCL 691.1401, et seq, which requires in many instances that specific information be provided to the State of Michigan (or the actual State entity being sued) within equal or even shorter time periods than notice must be provided to the Court of Claims under MCL 600.6431(3). See MCL 691.1404(1) (notice required within 120 days for defective highway claims, except for injured persons under 18 years of age who have 180 days); MCL 691.1406 (notice required within 120 days for injured persons with defective public building claims); MCL 691.1419 (notice within 45 days of claims alleging that a "sewage disposal event" resulted in property damage or personal injuries to the claimant).

Claims against the State of Michigan must be filed in the Court of Claims under the Court of Claims Act, MCL 600.6401, et seq. MCL 691.1410 similarly provides that "[c]laims against the state authorized under this act [the GTLA] shall be brought in the manner provided in sections 6401 to 6475 of the [Court of Claims Act]. Such claims against the State include personal injury claims, and more specifically, the claim here for an employee's negligent operation of a government owned vehicle under MCL 691.1405.

The Court of Claims Act provides for notice or the claim itself to be filed with the Court of Claims (and provided to the State of Michigan) within a specified time period. The time period is not the same for all claims. MCL 600.6431(3) provides that notice of a personal injury or property damage claim or the claim itself "shall be filed within 6 months" of the incident giving rise to the claim. In contrast, the time frame for filing notice or the claim itself with the Court of Claims in non-personal injury (or property damage) claims is longer than 6 months; MCL 600.6431(1) requires that notice of the intention to

file a claim or the claim itself must be filed with the Court of Claims "within 1 year" under MCL 600.6431. The requirements under MCL 600.6431(1) and (2) are more substantial in terms of the information that must be provided with the notice or claim. Verification of the allegations is required under MCL 600.6431(2). There is no verification requirement under MCL 600.6431(3) for personal injury claims. MCL 600.6431(3) is not specific as (1) and (2) as to information that must be provided to meet its more limited requirements.

At least three Court of Appeals' decisions have held that this Court's "strict compliance" rationale from *Rowland, supra,* should be extended to MCL 600.6431(3). This case is included among those decisions. *McCahan v Brennan*, 291 Mich App 430, 435; 804 NW2d 906 (2011); see also, *Kline v Dep't of Transportation*, 291 Mich App 651; ___ NW2d ___ (2011) (following McCahan pursuant to MCR 7.215(J) as binding precedent) *Lemerand v Univ of Mich Regents* (TAB A), unpublished per curiam opinion of the Court of Appeals, Docket Nos 298637 & 300157, October 20, 2011, slip op at p 6 (applying *Rowland, supra,* and *McCahan, supra,* to support its holding that the same public university involved in this case was not required to show actual prejudice under 600.6431(3) in order to have the claim dismissed) ; *Property and Casualty Ins Co of Hartford v Dep't of Transportation* (TAB B), unpublished per curiam opinion of the Court of Appeals, Docket No 285749, April 22, 2010, slip op at p 7 (holding the notice requirement in MCL 600.6431(3) should be enforced as written under *Rowland, supra*, and actual prejudice is not required to enforce its provisions) .

In contrast, several Court of Appeals' opinions issued before *Rowland, supra,* held that where a plaintiff fails to strictly comply with MCL 600.6431(3), substantial compliance will satisfy the Court of Claims notice provisions, and therefore, the State

had to demonstrate actual prejudice to its position before the claim could be dismissed. See *In re Estate of Fair v State Veterans Facility of Michigan*, 55 Mich App 35; 222 NW2d 22 (1974) (estate's administrator substantially complied with MCL 600.6431(1) by filing an unverified complaint within one year, and then filing an amended but untimely verified complaint); *Horner's Trucking Service, Inc v Michigan State Highway Dep't*, 64 Mich App 513; 236 NW2d 122 (1975) (state highway department must show prejudice from plaintiff truck owner's failure to file a notice or claim within one year under MCL 600.6431(1) for case to be dismissed); *May v Dep't of Natural Resources*, 140 Mich App 730; 365 NW2d 192 (1985) (unsupported ex parte factual claims did not sustain the burden of showing actual prejudice under MCL 600.6431(3)).

While these pre-*Rowland* decisions in the Court of Appeals do not constitute binding precedent on that Court under MCR 7.215(J), none were expressly reversed by *Rowland, supra,* or by the ensuing progeny of Court of Appeals' opinions, applying Rowland, supra, to other statutory notice provisions. Clearly, this Court can revisit the substantial compliance issue to review whether the change in the law in *Rowland, supra,* also affects the notice provisions under MCL 600.6431 of the Court of Claims Act.

In addition to these earlier pre-*Rowland* rulings, numerous Court of Appeals' judges have since disagreed with applying the rationale from *Rowland, supra,* to dismiss cases based on MCL 600.6431(3). See *Property and Casualty Ins Co, supra,* at p 3 (MURPHY, J. dissenting) (arguing that the Supreme Court's decision in *May, supra,* should control interpretation of MCL 600.6431 because *Rowland, supra,* did not construe that statute, and because this Court declined to directly address the issue by denying leave to appeal in *Beasley v State of Michigan,* 483 Mich 1025; 765 NW2d 608

(2009)); *McCahan*, *supra*, (FITZGERALD, J. dissenting) (reaffirming Judge Murphy's dissent in *Property and Casualty Ins Co, supra,* and following the Court of Appeals' ruling in *May, supra,* which held a plaintiff's claims are not barred by failing to comply with MCL 600.6431(3) unless the defendant established that it was prejudiced by the noncompliance); *Kline, supra,* (HOEKSTRA, P.J., Beckering and Fitzgerald, J.J) (holding "*McCahan* was wrongly decided and that *Rowland* does not dictate the outcome in this case because it involved a different statutory provision. But for the mandate in MCL 7.215(J)(1), we would not follow *McCahan.*"); *Cunmulaj v Chaney*, unpublished per curiam opinion of the Court of Appeals, Docket Nos 282264 & 282265, February 12, 2009) (reasoning that because "[t]here are countless other statutory notice requirements codified by our Legislature that are not mentioned in *Rowland.* There is no reason to extend our Supreme Court's holding to overturn the previous standard of substantial compliance with statutory notice requirements in other statutes.") (TAB C); see also, *Beasley, supra,* (KELLY, J. concurring) (concluding that "*Rowland* does not dictate the outcome here because it involves a different statutory provision").

SUMMARY OF ARGUMENT

The fundamental question in this case is whether the notice provision addressed in *Rowland, supra,* namely, MCL 691.1404(1), can be distinguished from the Court of Claims' notice provisions, in particular, MCL 600.6431(3). In other words, this case asks whether *Rowland, supra,* must be applied strictly to enforce MCL 600.6431(3), because, if so, MCL 600.6431(3) would prevent McCahan from pursuing her personal injury claim.

In order to answer that question, however, it is important to fully understand the meaning and purpose of the Court of Claims' notice provisions. Until those provisions are understood, there is simply no way to determine if strict compliance, as in *Rowland, supra,* is actually required, or whether substantial compliance will suffice in some cases, particularly, where the State was not prejudiced by the non-compliance because information was provided about the pending claim in some other manner or form.

At the outset, it must be reiterated that MCL 600.6431(1) and MCL 600.6431(2) are separate, distinct notice provisions from MCL 600.6431(3) with different requirements and different time deadlines for filing notice or claim itself with the Court of Claims. This matter, as posited by this Court in its Order granting leave to appeal, addresses only whether failing to comply with MCL 600.6431(3) precludes a personal injury claim against the State. On appeal, this case does not ask whether MCL 600.6431(1) and its corollary, MCL 600.6431(2) applies to personal injury claims,

Simply put, MCL 600.6431(1) and MCL 600.6431(2), do <u>not</u> apply to personal injury and property damage claims, because MCL 600.6431(3) creates a specific, shorter deadline for filing notice or the claim itself with the Court of Claims in such cases. MCL 600.6431(1) and (2) govern all non-tort claims against the State. Unlike MCL 600.6431(3), which expressly states that it applies to personal injury (and property damage claims), neither MCL 600.6431(1) nor MCL 600.6431(2) identify specifically the types of claims to which its more rigorous provisions and deadlines should be applied.

Regardless, Defendant-Appellee speaks broadly of the Court of Claims' notice provisions in its briefing, as if MCL 600.6431(1) and (2) also apply to personal injury and property damage claims against the State. Defendant-Appellee repeatedly ignores key

distinctions between these 2 notice provisions. The simple fact is that MCL 600.6431(3) can be distinguished from MCL 600.6431(1) and (2) on a number of grounds.

First, as stated above, the statute's plain, unambiguous language demonstrates that MCL 600.6431(1) and (2) clearly are not intended to apply to the same claims as MCL 600.6431(3), e.g., personal injury and property damage claims. This point is manifested by the fact that MCL 600.6431(1) and (2) speak more broadly than MCL 600.6431(3). MCL 600.6431(1) states that "no claim shall be maintained" if notice or the claim itself is not filed with the Court of Claims within the 1 year time period. In contrast, MCL 600.6431(3) states that its 6 month deadline for filing notice or the claim itself with the Court of Claims applies "[i]n all actions for property damage or personal injuries." In sum, MCL 600.6431(1) allows 1 year for the claimant to file the notice or claim with the Court of Claims, and MCL 600.6431(3) provides only 6 months.

If both MCL 600.6431(1) and MCL 600.6431(3) apply to personal injury claims against the State of Michigan, why have 2 different time deadlines for filing notice or claim itself with the Court of Claims? Why require duplicative filings (much less triplicate in defective highway and public building cases) for claims against the State of Michigan?

Why require personal injury claimants file notice or the claim itself with the Court of Claims within 6 months under MCL 600.6431(3), and then, require them to file a second notice (or the claim if not already filed) in the Court of Claims within 1 year ?

MAJ submits that there is no good answer to these questions, and accordingly, MCL 600.6431(1) and (2) is not required because the plain language in the Court of Claims Act creates an exception to it for personal injury claims under MCL 600.6431(3).

Second, historically, MCL 600.6431(3) has always been a separate and distinct provision from MCL 600.6431(1) and MCL 600.6431(2). In fact, MCL 600.6431(3) was only added after the Court of Claims Act was already enacted. See 1943 Mich Pub Acts 237 (effective July 30, 1943). Clearly, there is no substantive reason for adding MCL 600.6431(3) if it is merely intended to fulfill the same purpose as 600.6431(1) and (2). If MCL 600.6431(1) and (2) are intended to ensure that the State is notified of claims promptly (and adequately) so investigations can be performed and hazards remedied – purposes already addressed by MCL 691.1404, for highway defect claims, and MCL 691.1406, for public building claims, but not motor vehicle accident claims – then MCL 600.6431(3) must be designed to fulfill some other goal unique to personal injury claims against the State, especially when it comes to claims under MCL 691.1405 for a state employee's negligent operation of a state-owned motor vehicle. Otherwise, MCL 600.6431(3) is totally superfluous and the Legislature added it unnecessarily. MAJ submits that its purpose pertains primarily to the functioning of the Court of Claims.

Third, as suggested above, MCL 600.6431(3) is obviously more an administrative provision unique to tort claims than it is a substantive provision that should be applied to all claims against the State of Michigan. Succinctly stated, MCL 600.6431(3) provides nothing more than a useful tracking device for personal injury and property damage claims. It informs the Court of Claims of the resources that will be needed to process such claims given the approximate volume of claims pending at any given moment. After all, the Court of Claims also serves as a state circuit court which needs judicial resources too. Such tracking of claims also provides the State of Michigan

with an opportunity to designate funds to pay anticipated claims as insurers do in setting reserves to pay unliquidated damages on personal injury and property damage claims.

Filing with the Court of Claims clearly serves a different purpose than other statutory notice provisions for claims against the government. It is not designed to inform the State of Michigan so that dangerous conditions can be ameliorated or so the State can marshal a defense to such claims – other statutory notice provision perform that function where prompt, adequate notice is essential to public safety and protection of the State's interests. To the contrary, MCL 600.6431(3) is merely an administrative tracking mechanism for unliquidated damages claims which may be pending against the State of Michigan. Such information is useful both to the Court of Claims, which must process such claims if litigation arises, and to the State of Michigan, which must pay such claims, if successful. However, the Court of Claims' notice provisions are not substantive like other statutory notice provisions. Consequently, substantial compliance is sufficient to fulfill the Court of Claims' notice provision even though it is not sufficient for other statutory notice provision, according to this Court's holding in *Rowland, supra.*

Fourth, even if this Court concludes that MCL 600.6431(1) and (2) do apply to personal injury and property claims and that MCL 600.6431(1) and (2) constitute strict notice provisions for claims against the State of Michigan – an interpretation which amicus curiae MAJ rejects because it is contrary to well-established law in Michigan and because it would inherently conflict with existing notice provisions applicable to defective highway and public building claims against the State of Michigan – the same is not necessarily true of MCL 600.6431(3). In other words, substantial compliance is clearly enough to satisfy MCL 600.6431(3), even if it is not enough to fulfill the notice

requirements under MCL 600.6431(1) and (2). For that reason alone, McCahan should win and the Court of Appeals' ruling should be reversed and this case should be remanded to the trial court for further proceedings on the merits. Other issues as to what may be required under MCL 600.6431(1) and (2) are not properly before this Court given the facts in this case. Accordingly this Court should not address those issues.

As stated previously, *supra*, this particular case can be distinguished from *Rowland, supra,* because, even if strict compliance is required for other statutory notice provisions, including MCL 600.6431(1) and (2), and even assuming that those additional notice provisions for the Court of Claims also apply to personal injury claims, because substantial compliance should beenough to satisfy the notice requirements under MCL 600.6431(3). Thus, McCahan should not lose this case based on a failure to comply with MCL 600.6431(3), because he complied with MCL 600.6431(1) and (2). Even, if this Court elects to apply the general notice rules under the Court of Claim Act, e.g., MCL 600.6431(1) and (2), as a legal requirement above and beyond MCL 600.6431(3), McCahan should win, because MCL 600.6431(3) is a different type of notice provision than other statutory notice provisions, including MCL 600.6431(1) and (2).

The essential point in McCahan 's case (even if not helpful to other personal injury claimants, unlike McCahan, do not file notice or the claim itself within 1 year) is that substantial compliance should be enough to comply with the more limited provisions under MCL 600.6431(3). Regardless of this Court's rationale in *Rowland, supra,* which favored generally strict compliance with notice provisions, McCahan should win in this case where notice was filed within 1 year but not filed within 6 months, because she clearly complied with MCL 600.6431(1) and (2), even if not with MCL 600.6431(3).

This Court should reverse the Court of Appeals' decision in this case and remand McCahan's personal injury claim to the trial court for further proceedings. This Court should also clarify that *Rowland, supra,* has no bearing on whether the Court of Claims' notice provisions, in particular, MCL 600.6431(3), mandate strict compliance in order for a personal injury or property damage claim to be pursued against the State of Michigan. And as discussed above, this Court should clarify that MCL 600.6431(3) is the only notice provision applicable to personal injury claims under the Court of Claims Act.

ARGUMENT

I. MCL 600.6431(3) was added by the Michigan Legislature after it had already enacted MCL 600.6431(1) and (2). The original language in 600.6431(3) demonstrates that the notice provision for personal injury claims against the State of Michigan was intended to be a specific exception under the Court of Claim Act to the general notice rules set forth in MCL 600.6431(1) and (2). Because MCL 600.6431(3) is an exception for personal injury claims, such claim are not also subject to the conditions or requirements of MCL 600.6431(1) and (2) as with other claims filed against the State of Michigan.

The primary goal in construing a statute is "to give effect to the intent of the Legislature." *In re MCI Telecom Complaint,* 460 Mich 396, 411; 596 NW2d 164 (1999). This Court begins by examining the statute's plain language. *People v Morey,* 461 Mich 325, 330; 603 NW2d 250 (1999). If the statute's language is clear and unambiguous, then the Court assumes that the Legislature intended its plain meaning and the statute is enforced as written. *People v Stone,* 463 Mich. 558, 562; 621 NW2d 702 (2001). A necessary corollary of this most basic rule of statutory construction is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the

Legislature as derived from the words of the statute itself. *Omne Financial, Inc v Shacks, Inc,* 460 Mich 305, 311; 596 NW2d 591 (1999).

In sum, "[t]his Court must not determine whether there is a 'more proper way' the Legislature should have chosen, but rather must determine what the Legislature actually intended." *Houghton Lake Area Tourism and Convention Bureau v Wood*, 255 Mich App 127, 134-35; 662 NW2d 758 (2003), citing *Tyler v Livonia Pub Schools,* 459 Mich 382, 392 n 10; 590 NW2d 560 (1999); *Koontz v Ameritech Services, Inc,* 239 Mich App 34, 47; 607 NW2d 395 (1999), rev'd on other grounds 466 Mich 304; 645 NW2d 34 (2002). Further, a court cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there. *People v Jahner,* 433 Mich 490, 504; 446 NW2d 151 (1989); *Voorhies v Faust,* 220 Mich 155, 157-159; 189 NW 1006 (1922).

Similarly, words excluded from a statute—especially when used elsewhere in the same statute—must be presumed to have been excluded for a reason. *Farrington v Total Petroleum, Inc,* 442 Mich 201, 210, 501 NW2d 76 (1993). Furthermore, a statute's provisions must be construed in light of the other provisions of the statute to carry out the apparent purpose of the Legislature. *Farrington*, supra at 209, citing *Dagenhardt v Special Machine & Engineering, Inc,* 418 Mich 520; 345 NW2d 164 (1984); see also, *Workman v DAIIE,* 404 Mich 477, 507; 274 NW2d 373 (1979).

A. MCL 600.6431(3) originally included the proviso "[p]rovided, however," which made clear that subsection (3) was an exception to the requirements of MCL 600.6431(1) and (2). Although that proviso was later removed as a "house-keeping" measure, the substance of subsection (3) remains the same and thus, it continues to be an exception to the general notice rules for non-tort claims set forth in MCL 600.6431(1) and (2).

The Legislature first added a notice provision to the Court of Claims Act in 1941 with Public Act No. 137, which was effective January 10, 1942. See 1941 Mich Pub Acts 137. The original version did not contain what is now known as MCL 600.6431(3). That section was not added until 1943 with Public Act No. 237, which was effective July 30, 1943. See 1943 Mich Pub Acts 237. As originally enacted, MCL 600.6431(3) read:

> Provided however, that in all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within six months following the happening of the event giving rise to the cause of action. (emphasis added).

The statute was then consolidated as part of the Revised Judicature Act in 1961. 1961 Mich Pub Act 236. During that revision, the "[p]rovided however" language from subsection (3) was removed. Importantly, the Legislature's removal of this language was not a change in the substance of subsection (3). Rather it was part of a greater effort to clean up the language in the statute. The Michigan Legislative Drafting Manual, p 55 (1986) (TAB D) expressly states that, "'[p]rovided, [t]hat,'" and '[p]rovided, however, [t]hat' are archaic phrases and should not be used." The manual also provides that such provisos "should be eliminated as bills are prepared amending those sections." *Id.* It instructs that "[u]sually the phrase may be eliminated simply by striking out the words, and making a sentence out of the remaining portion," and thus, "[g]reat care should be taken that the substance of the law is not changed by the elimination of the proviso." *Id.*

Accordingly, in consolidating the statutes in the Revised Judicature Act, the Legislature removed "[p]rovided however" from the original version of MCL 600.6431(3), and left the remaining portion, or what is currently MCL 600.6431(3). That change,

however, did nothing to alter the substance of the Court of Claims' notice provisions. MCL 600.6431(3) should be read as if "[p]rovided however" had not been eliminated.

If the Legislature had intended a more substantive change to the law, it would have done more than simply remove the words "[p]rovided, however" from MCL 600.6431(3). See generally, *People v Coffee*, 151 Mich App 364, 374; 390 NW2d 721 (1985), in which the Court of Appeals concluded that the Legislature's removal of the entire proviso "[p]rovided, [t]hat no person who has been twice convicted of a felony in this state or elsewhere, shall be so placed on probation" was intended to alter the substance of the probation statute" unlike as in this instance, only the transitional use of a "provided" type phrase was deleted. Such a minor alteration is thus consistent with a "house-keeping" type amendment than a substantive shift in the law. *Coffee, supra.*

In general, provisos "introduce an expression of limitation." Michigan Legislative Drafting Manual, p. 55 (1986); see also Garner's Dictionary of Legal Usage (3d ed) (stating that "in drafting, a proviso is . . . . a clause . . . . that makes some condition, stipulation, exception, or limitation . . ."). More specifically, when drafted into statutes, a proviso is a clause "which limits, restrains, or determines in some particular the application of the statute." Ballantine's Law Dictionary 1017 (3d ed); see also 1A Sutherland Statutory Construction § 20:22 (7th ed) (stating, "'[p]rovided however' can also be interpreted as a proviso that qualifies as an exception to a statute."). Further, a proviso "is said to **remove special cases from the general enactment** and provide for them specially," and "the proviso [is] an added clause **limiting the operation of the [general] rule** and being introduced by the word 'provided' or the words 'provided, however.'" 1A Sutherland Statutory Construction § 20:22 (7th ed) (emphasis added);

see also *Luce v Rogers*, 181 Mich 599, 603; 148 NW 381 (1914) ("the general rule of statutory construction that the office of a proviso is to limit, modify, or explain the main part of the section to which it is attached, rather than to enlarge its provisions, unless it is clearly apparent that the Legislature intended a more comprehensive meaning."); *Charter Twp of Warren v Municipal Finance Com'n*, 341 Mich 607, 612; 67 NW2d 788 (1954) (recognizing that a proviso may be equivalent to an independent enactment).

In sum, "[p]rovided however" as it originally appeared in MCL 600.6431(3) is clearly the Legislature's plain language expression of a limitation on the operation of rest of the statute, e.g., MCL 600.6431(1) and (2). If subsections (1) and (2) are understood as setting forth the "general rule" with regard to notice requirements for claims against the state, the proviso in subsection (3) effectively limits the operation of the general rule, and thus removes personal injury claims from the general requirements enacted in subsection (1) and (2). 1A Sutherland Statutory Construction § 20:22 (7th ed).

MCL 600.6431(3) limits the operation of MCL 600.6431(1) regardless of whether the words "[p]rovided however" in MCL 600.6431(3) create a condition subsequent (to the event giving rise to the claim) or the words are some other type of limitation (on pursuing a personal injury claim. Black's Law Dictionary (9th Ed) denotes that "provided however" is one manner of creating a condition subsequent. It states the following:

> A condition that, if it occurs, will bring something else to an end; an event the existence of which, by agreement of the parties, **discharges a duty** of performance that has arisen. If ... the deed or will uses such words as 'but if,' 'on condition that,' '**provided**, **however**,' or 'if, however,' it will generally be assumed that a condition subsequent was intended." (emphasis added)

Black's Law Dictionary (9th ed), citing Thomas F. Bergin & Paul G. Haskell, *Preface to Estates in Land and Future Interests* 50 (2d ed 1984).

A condition subsequent generally states that the happening or nonoccurrence of some particular event after the contract becomes binding upon the parties, "causes the contract to terminate without further duties and obligations on any party." Am Jur Contracts § 464. "The use of the words "condition subsequent" in contracts, however, was borrowed from a similar use in the law of property . . . 'A condition . . . if subsequent, divests an estate vested.'" 13 Williston on Contracts § 38:9 (4th edition), quoting *Mutual Ben. Life Ins Co v. Hillyard*, 37 NJL 444 (NJ Ct Err & App 1874), cited by *Mackie v State Farm Mutual Auto Ins Co*, 13 Mich App 556, 561; 164 NW2d 777 (1968).

As applied here, MCL 600.6431(3) asserts that after "the happening of the event giving rise to" a personal injury or property damage claim, notice of intent to file a claim or the claim itself shall be filed within 6 months. Therefore, if "provided however" under MCL 600.6431(3) creates a condition subsequent in the same manner as contract or property law, then when the "event giving rise to" the personal injury occurs, the claimant is to provide notice within 6 months to fulfill that subsequent condition. If the claimant complies (substantially) with that duty, he or she has no further obligations with regard to the remainder of the statute. Specifically, the claimant no longer has an obligation under MCL 600.6431(1) of having to file notice within 1 year, or under MCL 600.6431(2), to provide the time, place, damage, and verification requirements. If the claimant substantially complies with MCL 600.6431(3), the fact that the claimant did not fulfill MCL 600.6431(1) and (2) in some manner, such as verification or the information provided, is of no consequence and it should not preclude her personal injury claim.

As an alternative to creating a condition subsequent, "provided however," may create some other form of limitation in the relationship between subsections (1) and (3). 1A Sutherland Statutory Construction § 20:22 (7th ed) (a proviso "is said to **remove special cases from the general enactment** and provide for them specially," and "the proviso [is] an added clause **limiting the operation of the [general] rule** and being introduced by the word 'provided' or the words 'provided, however.'"). In actuality, the "provided however" proviso here was intended to remove subsection (3) from the general enactment and provide for property damage and personal injury claims specially. *Luce*, supra at 603; see also *Saginaw County Twp Officers Ass'n v City of Saginaw*, 373 Mich 477, 483; 130 NW2d 30 (1964) (holding that the proviso "provided" was "plainly used to qualify what immediately precede[d] it."); *Ford Motor Co v Village of Wayne*, 358 Mich 653;101 NW2d 320 (1960). Michigan case law long ago established that MCL 600.6431(3) was added to limit the operation of the general rule contained in subsection (1). This crucial distinction was first recognized by the Court of Appeals in *Anthonsen v State Highway Commissioner*, 4 Mich App 345; 144 NW2d 807 (1966).

In *Anthonsen*, the claimants sought to recover damages for destruction of property and loss of income after tstrawberry and cauliflower crops were damaged when the State Highway Department removed topsoil from department property adjacent to the claimant's property. The department's removal of soil left a large hole on the department's property, and when exposed to wind, blew sand onto the claimant's crops—destroying them. *Id.* at 347. The damage occurred in April and May 1963. Pursuant to MCL 600.6431, the claimant filed a notice of intent to file a claim in September 1963 (four months after the incident), and a complaint in February 1964

(nine months after the incident). The plaintiff's September notice of intent to file a claim did not set forth specific details about the claim nor was it verified—as is required under MCL 600.6431(1). It did satisfy MCL 600.6431(3). The Court held that the claimants were not required to comply with all of MCL 600.6431(1). The Court stated:

> Two periods of limitations are set forth in . . . 600.6431 (Stat.Ann.1962 Rev. s 27A.6431), supra. It is a familiar rule of statutory construction that whenever possible a statute must be construed to give effect to all its provisions. **If the requirements set forth in subdivision (1) were essential to the notice required by subdivision (3), there would be no need for subdivision (3). Conversely, if the subdivision (3), time period were to be applicable to the details deemed necessary to maintain a claim against the state spelled out in subdivision (1), there would be no necessity for the longer period specified in subdivision (1).** When the statute is read as a whole it is apparent that the legislative intent was to provide for two time periods-the shorter one established to require that a claimant give prompt notice of his intention to file a claim, and the longer to provide the claimant with the opportunity to make his claim specific, but within a relatively short time.

Id. at 351 (internal citations omitted); see also *Reich v State Hwy Dep't*, 5 Mich App 509, 513; 147 NW2d 431 (1967) (reaffirming that MCL 600.6431(1)'s requirements are not to be imputed to MCL 600.6431(3), and also that MCL 600.6431(3)'s major requirements are the 6 month window for filing a claim and notice of the specific date of the incident).[1]

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[1]It should be noted that there is another appellate precedent with the same name, see *Reich v State Hwy Dep't,* 386 Mich 617; 194 NW2d 700 (1972), rev'd by *Carver v McKernan,* 390 Mich 96; 211 NW2d 24 (1973), which was discussed by this Court in *Rowland, supra*. It held that the original 60 day notice provision for highway defect claims was unconstitutional, but it was reversed. It is not the same case cited here. Thus, this other *Reich* case should not inform the Court's decision in this case.

In sum, *Anthonsen, supra,* and *Reich, supra,* 5 Mich App 509, at p 513, both stand for the proposition that subsection (1) should be read as establishing completely distinct requirements from subsection (3), and therefore that none of subsection (1)'s language should be imputed to subsection (3). This interpretation is completely consistent with the "provided however" proviso that originally prefaced subsection (3). By using that short proviso, the Legislature created a special limitation on the operation of subsection (1)'s general rule. Even though the proviso at issue was ultimately removed, the limitation remained, as evidenced by subsection (3)'s plain language, which does not reference subsection (1). As such the Court of Appeals in *Anthonsen, supra,* and *Reich, supra,* read subsection (3) in accordance with the Legislature's intent in drafting that provision by keeping it completely separate from subsections (1) and (2).

Clearly then, a plain language reading of subsection (3) also precludes the importation of subsection (1)'s condition that "No claim may be maintained against the State unless" certain requirements are met. *Anthonsen, supra,* and *Reich, supra,* already recognize that all of subsection (1)'s notice requirements are specific to that provision and cannot be imputed to subsection (3). *Anthonsen*, supra at 351; *Reich*, supra at 513. Because the Legislature's plain language created this limitation on MCL 600.6431(1), the Legislature clearly did not intend the first clause of that subsection to be imported to subsection (3) in some kind of piecemeal fashion. Alternatively, had the Legislature intended only the first clause (the conditional clause) of subsection (1) to be imputed to subsection (3), then it could very easily have said so. Interpreting the relationship between subsections (1) and (3) so that only the conditional clause of subsection (1) is imputed to subsection (3) is illogical and untenable.

Finally, the conclusion that subsection (1)'s limiting language ("No claim . . . shall be maintained . . .") should not be imputed to subsection (3) is further supported by the firmly established principle in Michigan that express provisions in one part of statute creates a interpretive presumption that those provisions were not intended in another part of the same statute that lacks those provisions. See *Robinson v City of Lansing*, 486 Mich 1, 25; 782 NW2d 171 (2010) (YOUNG, J. concurring) (stating that "[W]ords excluded from a statute—particularly when used elsewhere in the statute—must be presumed to have been excluded for a specific purpose."), citing *Farrington*, supra at 210 (holding that "absent an express statement of limitation by the Legislature, it would be improper for this Court to impose such a restriction."); *Byker v Mannes,* 465 Mich 637, 646–647, 641 NW2d 210 (2002) (stating "it is a well-established rule of statutory construction that this Court will not read words into a statute.").

Additionally, even if this Court is inclined to read subsections (1) and (3) as essentially different statutes because they were enacted at different periods of time by different Legislatures, the Court should still not read subsection (1)'s limitations into subsection (3). In Michigan, courts "cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption apply what is not there." *Jahner*, *supra,* at p 504, citing *Voorhies*, *supra,* at pp 157-158. In *Voorhies*, this Court held:

> The rule, in pari materia, does not permit the use of a previous statute to control by way of former policy the plain language of a subsequent statute, **much less to add a condition or restriction thereto found in the earlier statute and left out of the later one**. The contention made,

> if allowed, would go beyond the construction of the statute, and ingraft upon its provisions a restriction which the Legislature might have added but left out. (emphasis added).

Voorhies, *supra*, at pp.157-158.

Under *Voorhies*, the limitation provided in the earlier statute (subsection (1)'s "No claim may be maintained against the State unless . . .") should not be "ingraft[ed]" upon the later enacted subsection (3). *Voorhies*, *supra* at 157-158. Any court permitting such an alteration will be rewriting the statute and adding a restriction that the Legislature might easily have added, but chose to leave out. *Id.* Courts are obviously not in the business of rewriting laws, and this Court should not attempt such an undertaking here.

B. In addition to the Legislature's "[p]rovided however" limitation in MCL 600.6431(3), the remaining plain language in MCL 600.6431(3) supports the conclusion that the Legislature intended it to be a separate, distinct, and sufficient requirement for filing notice as to a property damage or personal injury claim against the State.

Following subsection (1)'s mandate regarding the requirements for filing any non-property damage or personal injury claims, subsection (2) states:

> **Such claim or notice** shall designate any department, commission, board, institution, arm or agency of the state involved in connection with **such claim**, and a copy of **such claim or notice** shall be furnished to the clerk at the time of the filing of the original for transmittal to the attorney general and to each of the departments, commissions, boards, institutions, arms or agencies designated.

MCL 600.6431(2) (emphasis added).

Clearly, the Legislature's reference in MCL 600.6431(3) to "such claims" points the reader back to those claims contemplated under MCL 600.6431(1). Thus, any

claims brought under MCL 600.6431(1) must also comply with the requirements of MCL 600.6431(2), and vice versa, because MCL 600.6431(2) clearly links the two provisions.

By stark contrast, MCL 600.6431(3) reads:

> In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

Noticeably absent from the plain language of MCL 600.6431(3) is any of the same linking language present in subsection MCL 600.6431(2). If the Legislature had intended personal injury claims to be subject to the requirements of MCL 600.6431(1) and (2), the Legislature could very easily have stated, "A notice of intent for **such claims** shall also be filed with the clerk of the court of claims in all actions for property damage or personal injuries within 6 months . . . ." (emphasis added). The Legislature obviously knew how to use such linking language because it did so in subsection (2). There is reason for such an omission if the Legislature did not intend MCL 600.6431(3) to be a self-contained provision. "[W]ords excluded from a statute—particularly when used elsewhere in the statute—must be presumed to have been excluded for a specific purpose." *Robinson*, *supra,* at p 25, citing *Farrington, supra* at p 210 ("absent an express statement of limitation by the Legislature, it would be improper for this Court to impose such a restriction."); *Byker, supra,* at pp 646–647 (stating "it is a well-established rule of statutory construction that this Court will not read words into a statute.").

Additionally, the indefinite article "a" as used in MCL 600.6431(3) also supports the conclusion that the Legislature did not intend personal injury claims be subject also to MCL 600.6431(1) and (2). This Court has stated, "[w]e must follow these distinctions

between "a" and "the" because the Legislature has directed that '[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language....'" *Robinson*, *supra* at p 14 n 13, quoting MCL 8.3a; and citing *Detroit v Tygard,* 381 Mich 271, 275; 161 NW2d 1 (1968) (stating "[w]e regard the use of the definite article 'the' as significant."); see also *Robinson v City of Detroit*, 462 Mich 439, 461-462; 613 NW2d 307 (2000) (reinforcing compliance with MCL 8.3a in the context of interpreting "a" and "the").

The distinction between the Legislature's use of "a" and "the" in *Robinson v City of Lansing* was dispositive. In that case, the Court attempted to determine whether the rebuttable inference of MCL 691.1402a(2) applied to defects with **all** highways or whether it only applied to defects with **county** highways. MCL 691.1402a(1) states in part that a municipality "is not liable for injuries arising from, a portion of a *county* highway . . . , including a sidewalk," unless certain conditions are satisfied. MCL 691.1402a(1) (emphasis added). MCL 691.1402a(2) states, "A . . . defect of less than 2 inches creates a rebuttable inference that the municipal corporation maintained **the** sidewalk, trailway, crosswalk, or other installation outside of the improved portion of **the** highway designed for vehicular travel in reasonable repair." MCL 691.1402a(2) (emphasis added). The Court ultimately concluded that subsection (2)'s rebuttable inference only applied to county highways, despite the fact that the word "county" did not appear in that subsection. *Robinson*, supra at 13-14. Central to the Court's holding was that subsection (2) referred to "*the* highway." *Id.* The court stated:

> "The" and "a" have different meanings. "The" is defined as "definite article. 1. (used, [especially] before a noun, with a specifying or particularizing effect, as opposed to the

> indefinite or generalizing force of the indefinite article a or an)...."

Robinson, *supra* at 14, quoting *Massey v Mandell,* 462 Mich 375, 382 n 5, 614 NW2d 70 (2000) (quoting Webster's College Dictionary p. 1382). In the Court's view, if subsection (2) had referenced "a" highway, it may have been permissible to conclude that inference in subsection (2) applied to highways in general. But because the Legislature specifically included the definite article "the" in subsection (2), that reference must therefore be limited to the same highway referenced in subsection (1), i.e., a "county" highway. *Robinson*, *supra* at pp 14-15.

The statute at issue here clearly illustrates the difference the majority in *Robinson, supra,* recognized in the Legislature's choice to use "a" or "the." In MCL 600.6431(3), the Legislature used the indefinite article "a" in establishing that a "claimant shall file with the clerk of the court of claims **a** notice of intention to file a claim or the claim itself within 6 months . . ." *Id.* (emphasis added). As discussed above, the Legislature clearly knew how to use words of limitation because it used the phrase "such claims" three times in MCL 600.6431(2). But in MCL 600.6431(3), there are not only no similar words of limitation, but the Legislature's reference to "**a** notice of intention" rather than "the notice of intention" supports the conclusion that MCL 600.6431(3) is not referring to the same claims as those in MCL 600.6431(1) and thus should be to be limited to subsection (1)'s requirements or conditional language. *Robinson*, *supra*, at pp 14-15. If the Legislature had intended for property damage and personal injury claims to be subject to the general rule regarding claims as set forth in MCL 600.6431(1), the Legislature could very easily have stated, "claimant shall file with the clerk of the court of

claims **the** notice of intention to file a claim or the claim itself within 6 months . . . ." But the Legislature did not use such limiting language, and this Court should not now read such a limitation into the plain language of the statute. See *State Farm Fire and Cas Co v Old Republic Ins Co*, 466 Mich 142, 148; 644 NW2d 715 (2002) ("If the Legislature had intended to use the definite article "the" instead of the indefinite article "a," it could have simply changed the construction of the sentence.").

Perhaps even more revealing of the Legislature's intentional use of the indefinite article "a" in MCL 600.6431(3), and to forestall any conclusion that its use of "a" was merely a fortuitous coincidence, is the fact that later in MCL 600.6431(3), the Legislature used the definite article "the" in reference to the property damage and personal injury claims it already mentioned: "In all actions for property damage or personal injuries claimant shall file with the clerk of the court of claims **a** notice of intention to file a claim or **the** claim itself within 6 months . . . ." MCL 600.6431(3) (emphasis added). The Legislature used "the" in this instance as a clear reference to the property damage and personal injury claims that are solely the subject of MCL 600.6431(3). Clearly then, the Legislature knew how to use articles, and very simply could have used "the" rather than "a" earlier in MCL 600.6431(3) if it had wanted personal injury claims to be subject to the specific requirements and restrictive conditional language of MCL 600.6431(1) *Massey, supra,* at p 382, n 5 (holding that "when . . . the Legislature has qualified the same word with the definite article "the" in one instance . . . and the indefinite article "a" in another instance, and both are within the same subsection of a statute, even more clearly there can be no legitimate claim that this Court should read "the" as if it were "a.").

In sum, in interpreting MCL 600.6431(3), this Court should look to the plain language limitations the Legislature put into that section in order to differentiate it from MCL 600.6431(1) and restrictive conditional language of MCL 600.6431(2). First, the Legislature originally included the proviso "[p]rovided however," which firmly established MCL 600.6431(3) was an exception to general notice rules under MCL 600.6431(1) and (2). Though that proviso was removed, it was removed as a matter of statutory housekeeping, and the legal substance of MCL 600.6431(3) was unaltered. As such, this Court should read MCL 600.6431(3) as if the proviso was still there. Second, the remaining plain language of MCL 600.6431(3) establishes that the Legislature intended that it not be subject to the requirements or conditions in MCL 600.6431(1) and (2). The Legislature knew how to make MCL 600.6431(3) related to MCL 600.6431(1), but it chose not to do so. This Court should not now rewrite the statute and interpret MCL 600.6431(3) as "going hand in hand" with MCL 600.6431(1) and (2).

II. The plain language of MCL 600.6431(3) establishes that the Legislature intended it to be separate from and not subject to the requirements of MCL 600.6431(1) and (2), and even more importantly in this case, substantial compliance with MCL 600.6431(3) is all that is required of claimants seeking to bring personal injury claims against the State of Michigan in order to fulfill the Legislature's intent as to providing notice in the Court of Claims.

Michigan Courts have long favored a liberal construction of notice requirements. *Ridgeway v City of Escanaba*, 154 Mich 68; 117 NW 550 (1908). "This judicial policy favoring a liberal construction is based on the theory that the inexpert layman with a valid claim should not be penalized for some technical defect." *Meredith v City of Melvindale*, 381 Mich 572, 579-580; 165 NW2d 7 (1969), citing *Brown v City of Owosso*, 126 Mich 91, 94-95; 85 NW 256 (1901). "This Court is committed to the rule requiring

only substantial compliance with the notice provisions **of a statute** or charter." *Meredith, supra*, at p 580, citing *Swanson v City of Marquette*, 357 Mich 424; 98 NW2d 574 (1959). This Court's decision in *Rowland, supra,* carved out at least one exception to these foundational principles by requiring strict compliance with MCL 691.1404(1).

Notwithstanding its ruling in *Rowland, supra,* this Court has not taken the opportunity to interpret MCL 600.6431(3) in the same strict way despite the fact that it has been presented with multiple opportunities to overturn lower court decisions disregarding or distinguishing *Rowland* and reaffirming that substantial compliance is all that is required under MCL 600.6431(3). See *Beasley*, supra at 1025 (KELLY, J. concurring in the denial of leave to appeal from a Court of Claims decision reiterating substantial compliance under subsection (3)) (Justice Kelly asserted, "*Rowland* does not dictate the outcome here because it involves a different statutory provision."); see also *Cunmulaj*, supra at *2 (Nos 282264-5), lv den 483 Mich 1021; 765 NW2d 328 (2009). In *Cunmulaj*, the Court of Appeals held: "There are countless other statutory notice requirements codified by our Legislature that are not mentioned in *Rowland.* There is no reason to extend our Supreme Court's holding to overturn the previous standard of substantial compliance with statutory notice requirements in other statutes."; see also *Kline*, supra, slip op at p 3 (holding "*McCahan* was wrongly decided and that *Rowland* does not dictate the outcome in this case because it involved a different statutory provision. But for the mandate in MCL 7.215(J)(1), we would not follow *McCahan.*").

Accordingly, there is no reason in the present case not to follow the long-standing rule of permitting claimants to substantially comply with notice provisions, especially

notice rules like MCL 600.6431(3). *Meredith, supra,* at p 580. It protects claimants from having their claims thrown out due to some technical defect even though notice of the claim has already been given to the interested parties. *Id.* Further, it protects the manifest purpose of this notice statute, which "is to **apprise the governmental agency** that an action is contemplated." *In re Estate of Fair*, supra at 39 (emphasis added).

As the Court implicitly recognized in *Fair, supra*, there is an important distinction between the claim and notice at issue in *Rowland, supra* (highway defects) and the claim at issue here (negligent operation of a vehicle). That distinction is that the government's interest in receiving notice is different for each type of claim. In short, notice is required for highway defect claims, as in *Rowland*, so the government can fix dangerous conditions as soon as possible, and so that evidence can be preserved before changes are made to the allegedly defective condition. See generally, *Hussey v City of Muskegon Heights,* 36 Mich App 264, 193 NW2d 421 (1971); *Plunkett v Dep't of Transportation,* 286 Mich App 168, 176-77, 779 NW2d 263 (2009).

In contrast, cases involving a government employee's negligent operation of a state owned vehicle under MCL 691.1405 does not create the same concerns. In negligent operation cases, there is no need for the government to take immediate action to protect the public from a dangerous condition because the accident has already happened. Accordingly, there is little risk after an auto accident that other persons will be similarly injured because the negligent act, as opposed to dangerous conditions, is not likely to be an on-going risk. Furthermore, an investigating police officer will likely have generated an accident report, and the Motor Vehicle Code also requires all persons operating a motor vehicle on a public highway to report being involved in an

accident. See MCL 257.619 through MCL 257.622. Additionally, visible vehicle damage also may inform the state government agency that owns the vehicle that its employee has been involved in a motor vehicle accident. Thus, in negligent operation cases, notice will likely be forthcoming almost immediately through a variety of sources other than the injured person. But, this is not the case with defect claims. With defective highway and public building claims, notice to the governmental agency responsible for maintaining the public building or the highway where the person was injured cannot be presumed because such claims often are not reported immediately. Additionally, unlike motor vehicle accident claims, it is not so easy to discover that a highway defect may have caused an accident and to ensure that a prompt investigation can be undertaken.

The starkly contrasting language of MCL 691.1404 (highway defects), MCL 691.1406 (public building defects), and MCL 691.1405 (negligent operation of state-owned vehicle) provides additional evidence that the Legislature thought notice for negligent operations claims should be different. In MCL 691.1404 and MCL 691.1406, the Legislature provided a specific notice requirement for defective highway and public building claims. By contrast, MCL 691.1405 does not contain any similar notice requirements for claims alleging a negligent operation of a state-owned motor vehicle.

Additionally, as noted previously, unlike highway defect claims under MCL 691.1404 and defective public building claims under MCL 691.1406, which clearly state that notice is required under the GTLA "as a condition to recovery" on the claim, the exception to governmental immunity for negligent operation of a state-owned vehicle, MCL 691.1405, does not condition damage recovery on whether notice was timely provided. This distinction is an important one because it reinforces that the Legislature

recognized the fundamental difference between public building defect and highway defect claims on the one hand and negligent operation claims on the other hand. The Legislature engrafted this fundamental distinction into the statute by conditioning recovery for defective public building and highway defect claims on fulfilling the notice requirements so the state can take immediate action to protect the public by repairing the dangerous condition. By contrast, the Legislature left this conditional language out of MCL 691.1405, and, as discussed previously, it did not require it in 600.6431(3).

In sum, the primary reasons for adopting notice requirements for claims against the state in other contexts do not necessarily ring true when it comes to negligent operation claims. Notice in negligent operation claims is likely to be immediately forthcoming, and the Legislature clearly chose not to put a notice provision or conditional language in MCL 691.1405. Thus, claimants with negligent operation claims *substantially* comply with all Court of Claims Act notice provisions and the State should be required to establish actual prejudice before motor vehicle accident claims can be dismissed. Otherwise, the courts are truly favoring form over substance (and justice).

The Legislature's sound logic in making a distinction in these statutes is perfectly illustrated in the present case. Plaintiff-Appellant McCahan sent a letter to Defendant-Appellee University of Michigan's legal counsel 5months after the accident. (Pl's Br p. 3). A Senior Claims Representative then sent McCahan a notice that her letter had been received and the incident was being investigated. (Pl's Br p. 3). That letter requested additional information from McCahan including her medical records, and stated that once an investigation had been completed, resolution would be discussed. (Pl's Br p. 4). All of these events occurred within MCL 600.6431(3)'s six-month window.

Clearly, Defendant-Appellant received actual notice that a lawsuit was being brought against it, and thus it had ample opportunity to investigate and prepare a defense. Accordingly, there is no logical rationale that supports the conclusion that because McCahan did not send an identical notice letter to the Court of Claims, she should now be precluded from bringing her personal injury claim in the Court of Claims. Defendant-Appellant had actual notice that it was going to be sued and it could therefore investigate and prepare for litigation or settlement. No purpose is served by requiring McCahan to strictly comply with the Court of Claims' notice provisions when she substantially complied by providing actual notice to the University of Michigan.

MCL 600.6431 is not a statute of limitation; it is merely a notice provision. It is not a notice provision designed to inform the government agency so much as the Court of Claims, where the claim will be resolved if litigation is necessary. The State also is protected by the statutes of limitations in Michigan. The Legislature was presumably aware of the statutes of limitation. Furthermore, the Courts in Michigan have recognized that important distinction as well. See *Dover & Co v United Pacific Ins Co*, 38 Mich App 727, 730; 197 NW2d 126 (1972) (emphasis added):

> **Statutes requiring notice of claim serve a different purpose than statutes of limitations**. Statutes of limitations establish an absolute time limit for the commencement of litigation. **Statutes requiring notice of claim are not aimed at forestalling litigation altogether, but mainly seek to provide a governmental authority with early warning** so that it can assemble information in support of a defense on the merits while the evidentiary trail is still hot. (emphasis added).

Thus, if the manifest purpose of the MCL 600.6431(3) is merely to provide notice to the state agency, and not to "forestall[] litigation altogether," reading MCL

600.6431(3) strictly as requiring notice to the Court of Claims within 6 months under all circumstances would be contrary to the statute's purpose of the statute. Imposing such a strict requirement on claimants despite the government having already received notice would be reading MCL 600.6431(3) as a statute of limitations, which it is not.

While the plain language of MCL 600.6431(3) clearly requires that it be read separately from MCL 600.6431(1) and (2), there is no sound reason for this Court to construe any of the notice provisions to Court of Claims requirement strictly. If the State is timely apprised of the claim, and acknowledges that it is investigating, it would be contrary to the Legislature's intent in enacting the Court of Claims' notice provisions to preclude a claim because the Court of Claims did not receive written notice of the claim. If this Court requires strict compliance here the Legislature's intent will be ignored.

CONCLUSION

This Court's task is to decide whether failing to strictly comply with MCL 600.6431(3) precludes a claim against the State of Michigan. The plain language of the Court of Claims' notice provisions makes it clear that strict compliance is not required. Substantial compliance is sufficient under MCL 600.6431(3), which is the only notice provision that should be applied to personal injury claims. Clearly, given its language, the Legislature did not intend personal injury claims to be further restricted by the general notice rules set forth in MCL 600.6431(1) and (2). The Legislature created MCL 600.6431(3) as an exception to the general notice provisions under the Court of Claims Act. When the State has been informed of a personal injury claim against it, failing to strictly comply with MCL 600.6431(3) should not act as a barrier to the courtroom. This

Court's ruling in *Rowland, supra,* under MCL 691.1404(1), is easily distinguished from cases involving the Court of Claims' notice provisions. Strict compliance with MCL 600.6431(3) should not preclude personal injury claims against the State of Michigan.

RELIEF REQUESTED

Amicus Curiae MAJ respectfully requests that this Honorable Court reverse the decision of the Court of Appeals and clarify that MCL 600.6431(3) alone constitutes the notice requirements in the Court of Claims for personal injury and property damage claims and substantial compliance with MCL 600.6431(3) is sufficient to bring a claim.

Dated: February 27, 2012

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PROOF OF SERVICE

I certify that I served this document on this date by enclosing two copies in sealed envelopes with first class postage prepaid, addressed to all counsel of record as listed below, and by depositing them in the United States mail.

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I declare that the statements above are true to the best of my information, knowledge, and belief.

Dated: February 27, 2012

Jennifer L. Behler

STATE OF MICHIGAN

COURT OF APPEALS

ALEX A. LEMERAND,

Plaintiff-Appellant,

v

UNIVERSITY OF MICHIGAN REGENTS,

Defendant-Appellee.

UNPUBLISHED
October 20, 2011

No. 298637
Court of Claims
LC No. 09-000067-MZ

ALEX A. LEMERAND,

Plaintiff-Appellant,

v

KEVIN SHELDON HARTMAN,

Defendant-Appellee.

No. 300157
Washtenaw Circuit Court
LC No. 09-000622-NI

Before: M. J. KELLY, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

Plaintiff appeals as of right the orders granting summary disposition in favor of defendants in these consolidated actions alleging tort liability arising from a governmental employee's negligent operation of a motor vehicle. We affirm.

On June 19, 2006, plaintiff was allegedly injured in a car accident involving a vehicle owned by defendant University of Michigan Regents (the university) and driven by its employee, defendant Kevin Sheldon Hartman, on university business at the time. According to Hartman, he was traveling 25 to 30 miles per hour and was following the car in front of him, which was driven by plaintiff, by two car lengths as he approached Division Street in Ann Arbor. The stoplight at Division Street turned from green to yellow, and plaintiff's vehicle stopped. Hartman slammed on the brake pedal with one foot. Hartman's vehicle struck plaintiff's vehicle in the rear. The police report regarding the accident described "no injuries," minor damage to Hartman's vehicle, and extensive damage to the rear of plaintiff's vehicle. The police cited

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Hartman for failure to stop within an assured distance. Hartman filled out a vehicle damage report for the University in which he described the accident as follows:

> The car in front of me stopped for a yellow light. I did all I could to stop my vehicle. Given the condition of the vehicle, not much happened when I forcefully applied the brakes. I was traveling west bound on Hill [S]treet toward Division, moving at the posted speed limit when the accident occurred.

During his deposition, Hartman described the vehicle's condition as "not ideal, but it – I don't believe that it wasn't – it wasn't unsafe." In two years of driving the vehicle, Hartman had never experienced a braking problem with the vehicle. Another university employee who drove the same vehicle for work did not recall any problems with the brakes. Plaintiff's supervisor testified that he had no safety concerns with the vehicle, that he was unaware of any problems with the vehicle's braking system, and that he did not recall Hartman reporting any problems with the vehicle.

On August 1, 2006, plaintiff sent a letter to Hartman advising him that he had retained counsel. The Senior Claims Representative for the University of Michigan Risk Management Services responded to plaintiff's letter, advising that she would be investigating the accident. On August 3, 2007, plaintiff demanded settlement.

On May 29, 2009, plaintiff filed a claim alleging negligence and gross negligence against Hartman in Washtenaw Circuit Court. On June 1, 2009, plaintiff filed a claim in the Court of Claims under the motor vehicle exception to governmental immunity, MCL 691.1405, alleging that the university negligently maintained the vehicle. Plaintiff's case in the Court of Claims was consolidated with his case in the Washtenaw Circuit Court under MCL 600.6421.[1]

The university moved for summary disposition, arguing that plaintiff's claim was barred for failure to file a claim, or notice of intention to file a claim, with the clerk of the Court of Claims within six months of the accident in violation of MCL 600.6431(3), the applicable notice provision of the Court of Claims Act, MCL 600.6401 *et seq*. Plaintiffs responded that summary disposition should be denied because the university was not prejudiced by plaintiff's noncompliance with the notice requirement. The trial court granted the university's motion pursuant to MCR 2.116(C)(7) on the ground that plaintiff failed to comply with the notice requirement.

Hartman also moved for summary disposition, arguing that this case involved nothing more than a standard car accident. Plaintiff asserted that the language in Hartman's report wherein he stated, "given the condition of this vehicle," showed that a genuine issue of material fact existed regarding whether the vehicle was unsafe. The trial court, finding no genuine issue

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[1] MCL 600.6421 provides that "[c]ases in the court of claims may be joined for trial with cases arising out of the same transaction or series of transactions which are pending in any of the various courts of the state."

of material fact regarding whether Hartman acted with gross negligence in operating the vehicle, granted summary disposition in favor of Hartman pursuant to MCR 2.116(C)(7) and (10).

Docket No. 298637

Plaintiff argues that the trial court erroneously granted summary disposition in favor of the University because the university failed to show that it was actually prejudiced by plaintiff's failure to comply with the notice requirements of MCL 60.6431(3).

This Court reviews de novo both a trial court's decision on a motion for summary disposition and questions of statutory interpretation. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007).

Under the governmental tort liability act, MCL 691.1404 *et seq*, a governmental agency is immune from tort liability when the agency is engaged in the exercise or discharge of a governmental function. MCL 691.1407(1). The grant of immunity is subject to six statutory exceptions, including the motor vehicle exception, MCL 691.1405, which provides in pertinent part:

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is the owner.

In an action for property damage or personal injuries, "claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action." MCL 600.6431(3).

In *Rowland*, 477 Mich 197, the Supreme Court held that a plaintiff's failure to comply with the notice requirements of MCL 691.1404(1) requires dismissal, regardless of actual prejudice to the defendant. *Id.* at 219. Although the present case involves MCL 600.6431(3), a panel of this Court has recently held that the *Rowland* rationale applies to other statutory notice provision, including MCL 600.6431(3). *McCahan* v *Brennan*, ___Mich App __; ___NW2d___ (Docket No. 292379, issued February 1, 2011), slip op at 2. Thus, under *Rowland* and *McCahan*,[2] defendant was not required to demonstrate actual prejudice from plaintiff's noncompliance with MCL 600.6431(3).[3] Because it is undisputed that plaintiff failed to comply

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[2] In *Kline v Dep't of Transportation*, ___ Mich App ___; ___ NW2d ___ (Docket No. 295652, issued March 1, 2011), slip op at 3, a panel of this Court declared a conflict with *McCahan* and followed *McCahan* only because it was required to under MCL 7.215(J)(1). This Court declined to convene a conflict panel and *McCahan* remains good law. *Klein [sic] v Dep't of Transportation*, unpublished order of the Court of Appeals, issued March 14, 2011.

[3] For the reasons stated in his dissenting opinion in *McCahan*, ___ Mich App at ___, Judge Fitzgerald believes that *McCahan* was wrongly decided.

with the notice requirement of MCL 600.6431(3), the trial court did not err in granting the university's motion for summary disposition.

Docket No. 300157

Plaintiff argues that the trial court erroneously granted summary disposition in favor of Hartman because there was a genuine issue of material fact as to whether he was grossly negligent. Although the trial court cited MCR 2.116(C)(7), (8), and (10) in its order granting summary disposition in favor of Hartman, the court clearly looked beyond the pleadings, and defense counsel specifically requested summary disposition pursuant to MCR 2.116(C)(7) and (10) at the hearing on the motion. We will therefore review the decision as though premised on MCR 2.116(C)(7) and (10).

A trial court properly grants summary disposition under MCR 2.116(C)(7) where a claim is barred because of immunity granted by law. When reviewing a motion under subrule (C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. *Dextrom v Wexford Co*, 287 Mich App 406, 429; 789 NW2d 211 (2010). "If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court." *Id.* at 430. Conversely, if a factual dispute exists as to whether immunity applies, summary disposition is not appropriate. *Id.* When reviewing a motion under subrule (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

A government employee is immune from tort liability if: (1) the employee is acting within the scope of his employment, (2) the government agency is discharging a government function, and (3) the employee's conduct does not amount to gross negligence. MCL 691.1407(2); *Costa v Community Emergency Med Servs, Inc*, 475 Mich 403, 409; 716 NW2d 236 (2006). Only factor (3) is at issue in this case.

"Gross negligence" is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). Evidence of ordinary negligence does not create a material question of fact concerning gross negligence. *Maiden v Rozwood,* 461 Mich 109, 122-123; 597 NW2d 817 (1999). Instead, a plaintiff must allege conduct of "almost a willful disregard of precautions or measures to attend to safety and a singular disregard for the substantial risks." *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004).

Plaintiff argues that Hartman was grossly negligent both in the manner in which he drove and in his decision to drive the vehicle "given its condition." No evidence has been introduced to show that Hartman was speeding or that he was driving recklessly. Although Hartman received a ticket for failure to stop within an assured distance, Hartman testified that he was driving two car lengths behind plaintiff's vehicle, that he saw the light turning yellow, and that he applied the brakes when plaintiff's car stopped. The failure to stop his vehicle before striking plaintiff's vehicle under the circumstances does not rise to the level of reckless disregard for

substantial risks. Additionally, plaintiff has not shown that Hartman's decision to drive the truck was grossly negligent. There was no evidence introduced that Hartman was previously aware of any braking or mechanical problem with the truck. Hartman's statement in the accident report prepared for the university after the accident was ambiguous and insufficient to create a question of fact as to whether he willfully disregarded safety measures by deciding to drive the truck. *Tarlea*, 263 Mich App at 90. There is simply nothing in plaintiff's pleadings that would remove Hartman from the protection of governmental immunity. Plaintiffs allege nothing more than ordinary negligence against Hartman. The trial court properly dismissed plaintiff's claim against Hartman.

Affirmed.

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck

STATE OF MICHIGAN

COURT OF APPEALS

PROPERTY AND CASUALTY INSURANCE COMPANY OF THE HARTFORD and SEDGWICK CLAIMS MANAGEMENT SERVICES,

Plaintiffs-Appellees,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

UNPUBLISHED
April 22, 2010

No. 285749
Court of Claims
LC No. 08-000020-MZ

Before: METER, P.J., and MURPHY, C.J., and ZAHRA, J.

PER CURIAM.

Defendant appeals as of right from the trial court's denial of its motion for summary disposition based on governmental immunity. We reverse and remand.

This case presents the question whether a government defendant must show that it was prejudiced by a plaintiff's noncompliance with the Court of Claims Act's notice provision in order to bar the plaintiff's claim(s). The case arises from the alleged negligence of defendant's employee on March 1, 2007, which caused damage to the Hometown Hardware Store. The Property and Casualty Insurance Company of the Hartford ("Hartford") was Hometown Hardware's insurer, and Sedgwick Claims Management Services ("Sedgwick") was the claims administrator. Hartford and Sedgwick ("plaintiffs") reimbursed Hometown Hardware for the alleged damage, and on February 27, 2008, plaintiffs filed a complaint against defendant alleging negligence and seeking reimbursement of the payments made to Hometown Hardware.

Defendant moved for summary disposition on several grounds, including failure of plaintiffs to file a claim, or notice of intention to file a claim, with the clerk of the Court of Claims within six months of the incident (or by September 1, 2007), in violation of MCL 600.6431(3),[1] the applicable notice provision of the Court of Claims Act, MCL 600.6401 *et seq.*

[1] MCL 600.6431(3) provides: "In all actions for property damage or personal injuries, claimant (continued...)

Plaintiffs responded, in part, that summary disposition should be denied because defendant was not prejudiced by plaintiffs' noncompliance with the notice requirement. Defendant replied that as a matter of law it was not required to show it was prejudiced by the noncompliance. The Court of Claims denied defendant's motion for summary disposition, holding, among other things, that defendant was required to show it was prejudiced by plaintiffs' noncompliance.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

Plaintiffs undisputedly failed to comply with the notice requirement of MCL 600.6431(3). In *May v Dep't of Natural Resources*, 140 Mich App 730; 365 NW2d 192 (1985), this Court held that a plaintiff's claims are not barred by failure to comply with MCL 600.6431(3) unless the defendant showed that it was prejudiced by the noncompliance. *May* has not been reversed or explicitly overruled. The question presented here is whether *May* was constructively overruled by *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007).

Rowland did not specifically address the notice provisions of MCL 600.6431; rather, it addressed the notice provision applicable to the defective highway exception to governmental immunity, MCL 691.1404(1). *Rowland* held that the notice provision of that statute contains no prejudice requirement and that the judiciary cannot read such a requirement into the statute. Defendant argues that *Rowland* stands more broadly for the proposition that when a claim against the government is involved, a prejudice requirement cannot be read into a statutory notice provision that contains no such requirement. MCL 600.6431 contains no prejudice requirement.

Defendant similarly relies on *Jones v Dep't of Transportation*, unpublished opinion per curiam of the Court of Appeals, issued October 25, 2007 (Docket No. 275076),[2] which addressed the notice provision applicable to the public building exception to governmental immunity, MCL 691.1406. *Jones* noted that no appellate decision had determined that a defendant was not required to show it was prejudiced by noncompliance with MCL 691.1406 to bar a plaintiff's claim. Citing *Rowland*, however, *Jones* held that the plaintiff's claims were in fact barred by such noncompliance, even if the defendant was not prejudiced. *Jones* found that the two notice provisions were identical in all relevant respects and were both part of the governmental tort liability act, MCL 691.1401 *et seq.*, so they should be interpreted in the same manner.

Plaintiffs argue that *Rowland* does not apply to this case because it does not address the notice provision at issue here, and no case has extended *Rowland*'s holding to this notice provision. Furthermore, plaintiffs argue that the notice provisions of MCL 600.6431 (*May*) differ significantly from those in the defective highway exception (*Rowland*) and public building exception (*Jones*) to governmental immunity. Plaintiffs point out that the latter two notice

(...continued)

shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action."

[2] Being an unpublished opinion, *Jones* is without precedential effect. MCR 7.215(C)(1). We discuss it here only for its reasoning because it is relied on by defendant.

provisions require notice to be served "[a]s a condition to any recovery for injuries sustained," MCL 691.1404, 691.1406, which plaintiffs argue imposes a condition on claimants to recover for their injuries. In contrast, MCL 600.6431(3) states: "In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim. . . ." Plaintiffs argue that this language does not impose such a condition on claimants. However, plaintiffs do not explain how this difference in wording creates any difference in effect. All three notice provisions require a plaintiff to provide notice within a specified time, and nothing in MCL 600.6431(3) suggests that a plaintiff can recover without providing the required notice.

The determinative question in this case is to what degree *Rowland*'s rationale and holding apply to other, arguably similar, statutory notice provisions. Relevant case law has been inconsistent.[3] *Rowland*'s plain-language analysis, however, is clear and unequivocal, as can been seen from the first sentence of the case, in which the Supreme Court stated simply that the issue was whether the notice provision "should be enforced as written." 477 Mich at 200. *Rowland* held that "MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, we conclude that it must be enforced as written." *Id.* at 219. MCL 600.6431 is similarly straightforward, clear and unambiguous; *Rowland*'s language therefore commands us to enforce it as written—with no prejudice requirement.

Although *Rowland* did not state that its holding should be applied to statutory notice provisions other than MCL 691.1404(1), its language and analysis broadly reflect the current jurisprudence on this issue. In its historical overview of notice statutes, *Rowland* discussed not only governmental immunity notice provisions but also the notice provision of the Motor Vehicle Accident Claims Act, MCL 257.1101 *et seq.* ("MVACA"). *Rowland* did not differentiate between the notice provision in the MVACA and the notice provision of MCL 691.1404(1) when it rejected the prejudice requirement that had been wrongfully "engrafted" onto both. We conclude that the Supreme Court would thus not differentiate between the notice provisions of MCL 691.1404(1) and MCL 600.6431(3).

We find additional support for our conclusion by examining the relationship between the Court of Claims Act and the governmental tort liability act. The latter provides that "[c]laims against the state authorized under this act shall be brought in the manner provided in" the Court of Claims Act. MCL 691.1410(1). MCL 691.1404(2) specifically states that complying with its notice requirements "shall constitute compliance with [MCL 600.6431], requiring the filing of notice of intention to file a claim against the state."[4] This Court has instructed that "[t]he Court of Claims act should be interpreted in light of the governmental immunity act. The latter statute,

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[3] Compare *Jones, supra*, unpublished opinion per curiam of the Court of Appeals, issued October 25, 2007 (Docket No. 275076), and *Chambers v Wayne Co Airport Auth*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2008 (Docket No. 277900), rev'd, 482 Mich 1136; 758 NW2d 302 (2008), aff'd on reconsideration, 482 Mich 1136; 758 NW2d 302 (2009).

[4] The notice provision applicable to the public building exception, in turn, states that "[n]otice to the state of Michigan shall be given as provided in [MCL 691.1404]." MCL 691.1406.

which was enacted three years after the former, refers to the same class of persons and shares a common objective of regulating claims against the state. Such statutes are 'in pari materia' and should be interpreted so as to be complementary and not contradictory." *Doan v Kellogg Community College*, 80 Mich App 316, 359; 263 NW2d 357 (1977). Reading a prejudice requirement into the notice provision of the Court of Claims Act but not the notice provision of the governmental immunity act is inconsistent with this command as well as with the legislative intent of the governmental immunity act.

We conclude that the trial court erred in denying summary disposition to defendant on the ground that it was required to show it was prejudiced by plaintiffs' noncompliance with MCL 600.6431(3).

Reversed and remanded to the Court of Claims for entry of an order granting defendant's motion for summary disposition. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Brian K. Zahra

STATE OF MICHIGAN

COURT OF APPEALS

PROPERTY AND CASUALTY INSURANCE COMPANY OF THE HARTFORD and SEDGWICK CLAIMS MANAGEMENT SERVICES,

Plaintiffs-Appellees,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

UNPUBLISHED
April 22, 2010

No. 285749
Court of Claims
LC No. 08-000020-MZ

Before: METER, P.J., and MURPHY, C.J., and ZAHRA, J.

MURPHY, C.J. (*dissenting*).

Because *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007), did not construe the language in MCL 600.6431(3), and because our Supreme Court has evidently decided not to extend the holding in *Rowland* to MCL 600.6431(3), I am not prepared to disavow *May v Dep't of Natural Resources*, 140 Mich App 730; 365 NW2d 192 (1985).[1] In *May*, this Court held that a plaintiff's claims are not barred by failure to comply with MCL 600.6431(3) unless the defendant established that it was prejudiced by the noncompliance. *May* has not been reversed or explicitly overruled.

Rowland interpreted MCL 691.1404(1), which differs from the statute at issue here, MCL 600.6431(3).[2] MCL 691.1404(1) provides that compliance with the notice provision is "a condition to any recovery for injuries sustained by reason of any defective highway;" however, MCL 600.6431(3) does not contain comparable "recovery precondition" language. More

[1] The majority correctly recognizes that the unpublished opinions dealing with statutory notice requirements not specifically addressed in *Rowland* lack precedential effect under MCR 7.215(C)(1).

[2] MCL 600.6431(3) provides that "[i]n all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action."

importantly, our own Supreme Court does not appear to be prepared to extend the holding in *Rowland* to MCL 600.6431(3). In *Beasley v Michigan*, 483 Mich 1025; 765 NW2d 608 (2009), the Michigan Supreme Court denied an application for leave to appeal relative to an order of this Court that had denied leave to appeal, which in turn pertained to an order by the Court of Claims denying summary disposition to the state. As reflected in a concurring opinion issued by CHIEF JUSTICE KELLY in *Beasley*, the state brought the motion for summary disposition on the basis that the plaintiff, who had been injured in a motor vehicle accident involving a state-owned vehicle, failed to comply with the notice requirement of MCL 600.6431(3). Thus, while I recognize that Supreme Court orders denying leave do not have precedential value, the order does appear to signal a mindset that *Rowland* is inapplicable to MCL 600.6431(3).[3] Indeed, in *Beasley*, CHIEF JUSTICE KELLY specifically expressed her opinion that "*Rowland* does not dictate the outcome here because it involves a different statutory provision." *Beasley*, 483 Mich at 1025.

Until the Supreme Court decides to substantively address the impact of *Rowland* on MCL 600.6431(1), which I encourage it to do as soon as possible, I will continue to recognize and respect this Court's decision in *May*. In my opinion, it defies logic to dismiss plaintiffs' claims here, where in *Beasley* the plaintiff is being permitted to proceed in the Court of Claims with the apparent blessing of the Supreme Court.

I respectfully dissent.

/s/ William B. Murphy

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[3] A concern about the change of course in *Rowland* relating to a prejudice requirement was evident in the dissenting opinion of JUSTICE CAVANAGH in *Rowland*, where he stated:

> Today this Court overrules a portion of our governmental immunity law that has been in place for over 30 years. Because I am not convinced that *Hobbs v Dep't of State Hwys*, 398 Mich 90; 247 NW2d 754 (1976), and *Brown v Manistee Co Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996), [which imposed a prejudice requirement], were wrongly decided, I dissent from the majority's decision to overrule these cases. I believe that the principles of stare decisis mandate that we continue to interpret MCL 691.1404(1) in accordance with *Hobbs* and *Brown*. [*Rowland*, 477 Mich at 270-271.]

STATE OF MICHIGAN

COURT OF APPEALS

SHERIF CUNMULAJ and DAWN CUNMULAJ,

Plaintiffs-Appellants,

v

KRISTEN CHANEY and HAROLD SCHOTT,

Defendants-Appellees.

UNPUBLISHED
February 12, 2009

No. 282264
Ingham Circuit Court
LC No. 07-000031-NZ

SHERIF CUNMULAJ and DAWN CUNMULAJ,

Plaintiffs-Appellants,

v

MICHIGAN STATE UNIVERSITY,

Defendant-Appellee.

No. 282265
Court of Claims
LC No. 07-000073-MK

Before: Sawyer, P.J., and Servitto and M. J. Kelly, JJ.

PER CURIAM.

Plaintiffs, owners of an injured horse, appeal as of right an order granting summary disposition to defendants. The horse was allegedly injured while in the care of defendant Michigan State University's (MSU) veterinary hospital, and plaintiffs allege financial losses as a result. Plaintiffs have filed a suit alleging negligence against all three defendants and a separate suit alleging breach of implied contract against MSU. These suits are consolidated here. We affirm.

MSU was granted summary disposition on the ground that plaintiffs failed to comply with the statutory notice requirement in MCL 600.6431, the Court of Claims Act. The trial court held that plaintiffs were bound by the requirement in subsection 3 of the statute because they were alleging damage to property. We review de novo both a trial court's grant or denial of a motion for summary disposition and questions of statutory interpretation. *Liptow v State Farm Mut Auto Ins Co*, 272 Mich App 544, 549; 726 NW2d 442 (2006).

MCL 600.6431 provides:

> (1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.
>
> (2) Such claim or notice shall designate any department, commission, board, institution, arm or agency of the state involved in connection with such claim, and a copy of such claim or notice shall be furnished to the clerk at the time of the filing of the original for transmittal to the attorney general and to each of the departments, commissions, boards, institutions, arms or agencies designated.
>
> (3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

MCL 600.6431(3) applies in this case because plaintiffs allege damage to their property. Horses, like cattle, which are income-generating animals, or pets are personal property. In *State Mut Cyclone Ins Co v O & A Electric Coop*, 381 Mich 318, 325; 161 NW2d 573 (1968), our Supreme Court deemed that death of cattle constituted damage to property in a decision focusing on the statute of limitations for property damages. More recently in *Koester v VCA Animal Hosp*, 244 Mich App 173, 176; 624 NW2d 209 (2000), we stated "[p]ets have long been considered personal property in Michigan jurisprudence" and held that a party cannot recover emotional damages for the loss of personal property. Contrary to plaintiff's argument it is immaterial that the horse at issue was apparently an income-generating asset (as a race horse) rather than a pet because personal property encompasses " 'everything that is the subject of ownership, not coming under denomination of real estate.' " *People v Fox (After Remand)*, 232 Mich App 541, 554; 591 NW2d 384 (1998), quoting Black's Law Dictionary (6th ed), p 1217.

In addition, MCL 600.6431(3) applies to claims that sound in tort or in contract. Plaintiffs contend that their claim of breach of contract against MSU must comply only with MCL 600.6431(1), which requires that a notice or claim be filed within one year with the office of the clerk of the Court of Claims. On June 19, 2007, within one year of the horse's second discharge from the hospital in July 2006, the Court of Claims received a notice of intent to file a claim alleging "breach of contract and damage to personal property" from plaintiffs. Plaintiffs attempt to argue that contract claims are not subject to MCL 600.6431(3) by focusing on the difference between contracts and torts. MCL 600.6431 is silent as to a distinction between torts and contracts for the notice requirements and subsection 3 plainly limits the notice requirement to within six months for all actions arising out of damage to personal property. This Court must ascertain the Legislature's intent according to its words, not its silence, and here, its words are

clear and unambiguous. *Donajkowski v Alpena Power Co,* 460 Mich 243, 261; 596 NW2d 574 (1999). Plaintiffs' claims are subject to the six-month limit.

Defendants contend that, in light of recent case law, plaintiffs were required to strictly comply with the notice requirement according to the plain language of MCL 600.6431(3) and "file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event" and that plaintiffs did not strictly comply. Recently, in *Rowland v Washtenaw Co Rd Comm,* 477 Mich 197; 731 NW2d 41 (2007), our Supreme Court strictly construed the notice requirement in the highway defect section of the Government Tort Liability Act (GTLA),[1] regardless of whether the governmental agency shows prejudice. In that case, the plaintiff alleged injury due to a highway defect and failed to serve notice on the Washtenaw County Road Commission within 120 days, as required by the GTLA. Our Supreme Court stated the following:

> This Court previously held in *Hobbs v Dep't of State Hwys,* 398 Mich 90, 96; 247 NW2d 754 (1976), and *Brown v Manistee Co Rd Comm,* 452 Mich 354, 356-357; 550 NW2d 215 (1996), that absent a showing of actual prejudice to the governmental agency, failure to comply with the notice provision is not a bar to claims filed pursuant to the defective highway exception. Those cases are overruled. [*Rowland, supra* at 200.]

Both *Hobbs* and *Brown* addressed governmental liability for injuries resulting from highway defects. The trial court in the instant case improperly stated *Rowland* has broad applicability and applied it in this case to find that plaintiffs failed to strictly comply with MCL 600.6431(3). *Rowland* deals only with a specific section of the GTLA that addressed public highway defects. There are countless other statutory notice requirements codified by our Legislature that are not mentioned in *Rowland.* There is no reason to extend our Supreme Court's holding to overturn the previous standard of substantial compliance with statutory notice requirements in other statutes.

Nevertheless, plaintiffs did not substantially comply with the notice requirement. The substantial compliance standard was applied in *Meredith v City of Melvindale,* 381 Mich 572, 580-581; 165 NW2d 7 (1969), where our Supreme Court stated that "[t]his Court is committed to the rule requiring only substantial compliance with the notice provisions of a statute or ordinance." *Id.* at 580. However, in that case, the plaintiff met the standard because a very specific and detailed letter was sent to the government entity. The decision stated as follows:

> Certainly, the receipt of such a notice—stating the day, the place, the activity, and the serious injuries to the minor boy; reciting that the father had unsuccessfully attempted to contact the city attorney; giving the father's phone number where he could be contacted; and asserting that the father had suffered great financial expense—should have alerted the city attorney and his employer, the City of Melvindale, that an accident had occurred which should be

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[1] MCL 691.1401 *et seq.*

> investigated. This alone, in the judgment of this Court, would be sufficient to constitute substantial compliance with the charter. [*Id.* at 580-581.]

In the instant case, plaintiffs assert that, even if they were required to provide notice within six months under MCL 600.6431(3), they did substantially comply with this requirement because plaintiffs' counsel sent a FOIA request to the College of Veterinary Medicine at MSU on August 7, 2006, within six months of the horse's injury. The request stated as follows:

> Re: Honor the Cash
>
> Gentlemen:
>
> Pursuant to and in accordance with the applicable provisions of the Michigan Freedom of Information Act, please provide the undersigned with a copy of any and all documents of every nature and kind relating to the care, treatment and investigation of the horse's injury while said horse was in the care of your facility.

The letter was from plaintiffs' attorney on his professional letterhead and made reference to the horse's injury but it does not amount to substantial compliance with MCL 600.6431(3) because the letter did not involve any implication that plaintiffs intended to file a claim against defendants, but merely that plaintiffs were investigating the injury to the horse. It was merely a request for information, much unlike the detailed information in the letter in *Meredith*. Plaintiffs have not indicated that upper level management or MSU's counsel's office was made aware of the FOIA request or that it was interpreted to imply an impending lawsuit. Although the trial court erred in requiring strict compliance with the notice requirement, plaintiffs did not meet their burden to substantially comply with the requirement and their claims were properly dismissed.

Next, the trial court stated that there was not enough information on the record to grant summary disposition on the issue of proprietary exception to governmental immunity to defendant MSU.

The GTLA provides that, in general, governmental agencies engaged in governmental functions are immune from tort liability. MCL 691.1407. It provides in part:

> (1) Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.
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> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by

the volunteer while acting on behalf of a governmental agency if all of the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

* * *

(7) As used in this section:

(a) "Gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. [MCL 691.1407].

The statute defines "governmental function" as

> an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law. Governmental function includes an activity, as directed or assigned by his or her public employer for the purpose of public safety, performed on public or private property by a sworn law enforcement officer within the scope of the law enforcement officer's authority. [MCL 691.1401(f).]

In *Harris v Univ of Mich Bd of Regents*, 219 Mich App 679, 684; 558 NW2d 225 (1996), we held that, [a]ccording to well-established case law, this definition is to be broadly applied and requires only that there be some legal basis, statutory, constitutional or otherwise, for the activity the governmental agency was engaged in. Also, we look to the general activity being performed, rather than the specific conduct involved when the alleged injury or property damage occurred. *Smith v Dep't of Pub Health*, 428 Mich 540, 609-610; 410 NW2d 749 (1987).

The GTLA provides an exception to governmental immunity when an agency is engaged in proprietary functions. It states as follows:

> The immunity of the governmental agency shall not apply to actions to recover for bodily injury or property damage arising out of the performance of a proprietary function as defined in this section. Proprietary function shall mean any activity which is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees. No action shall be brought against the governmental agency for injury or property damage arising out of the operation of proprietary function, except for injury or loss suffered on or after July 1, 1965. [MCL 691.1413.]

The test for whether an agency is engaged in a proprietary function requires that "[t]he activity (1) must be conducted primarily for the purpose of producing a pecuniary profit, and (2) it cannot be normally supported by taxes and fees." *Coleman v Kootsilas*, 456 Mich 615, 621; 575 NW2d 527 (1998). "[T]he fact that the activity consistently generates a profit may evidence an intent to produce a profit." *Id.* (citation omitted). However, that "is not sufficient to make the activity proprietary because generating a profit must be the *primary* motive." *Harris, supra* at 690 n 2 (emphasis in original). Where the profit is deposited and how it is spent are relevant factors to determining the primary purpose of the activity as well. *Coleman, supra* at 621.

In order to maintain their action, plaintiffs must have pleaded in avoidance of governmental immunity. "A plaintiff pleads in avoidance of governmental immunity by stating a claim that fits within a statutory exception or by pleading facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function." *Mack v Detroit*, 467 Mich 186, 204; 649 NW2d 47 (2002). Plaintiffs' complaint states the following:

> 23. The Defendant was engaged in a for-profit pecuniary function, the primary purpose of which was to generate pecuniary profit, thereby precluding statutory immunity.
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> 27. On or about June 30, 2006, Defendants Schott and Chaney breached their duty of care, in that they were grossly negligent by allowing Honor the Cash to rush into his stall, thereby being injured.
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> * * *
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> 29. The breach of Defendants' duty amounts to a willful disregard of precautions to attend to the safety of Honor the Cash, and shows a disregard of substantial risk. Therefore, Defendants have committed gross negligence and are not protected by statutory immunity.

Plaintiffs properly stated claims that fit within statutory exceptions to immunity, namely that defendants were engaged in a proprietary function and that defendants Harold Schott and Kristen Chaney were grossly negligent, which would except defendants from governmental immunity under MCL 691.1413 and MCL 691.1407(2)(c).

Whereas the trial court stated that there was not enough information in the record to grant summary disposition to defendants based on this issue, defendants are immune because the veterinary hospital is a governmental function under the GTLA. The veterinary hospital does not fall under the proprietary function exception to governmental immunity. Plaintiffs argue that because defendants run the veterinary hospital with little or no state funding, as it states on its website, and because the hospital must produce pecuniary profit to sustain itself, the first part of the proprietary function test is satisfied. Plaintiffs overlook that the primary purpose of the activity must be to produce pecuniary profit and that the "use of profits to defray the expenses of the activity itself indicates a nonpecuniary purpose." *Harris, supra* at 690 n 2 (citation omitted). Plaintiffs have not offered evidence that this was the primary purpose of the hospital. In

addition, "[a] governmental agency may conduct an activity on a self-sustaining basis without being subject to the proprietary function exception." *Id.* at 690. Therefore, evidence that the hospital's profits are used to sustain its operations does not necessarily show that defendants are engaged in a proprietary function. Defendants do not engage in running the veterinary hospital primarily for the purpose of producing a pecuniary profit, but rather to provide clinical teaching services and plaintiffs have not presented any evidence to create a genuine issue that the primary purpose may be to gain a profit.

In addition, the activity cannot be normally supported by taxes and fees to qualify as a proprietary function. However, if the hospital were not gaining any revenue, as a department of a state sponsored educational institution, it would normally be supported by student fees and taxes on the population. The hospital here is not merely a veterinary hospital, but an arm of one of the state's educational institutions. The veterinary hospital is not a proprietary function of the government and thus, defendants are immune from tort liability associated with the functioning of the hospital.

The trial court properly ruled that the gross negligence claims against the individual defendants were not adequately pled or supported and dismissed them, rendering the individual plaintiffs immune to tort liability under the GTLA. Plaintiffs did not allege facts to support that Schott and Chaney were grossly negligent in allowing the horse to "rush into his stall, thereby being injured." Although plaintiffs argued in the trial court that additional discovery will allow them to show that only gross negligence could cause the "tremendous amount of trauma" that would have occurred to cause such a serious injury[2] their claim plainly rests on the theory of res ipsa loquiter as stated in Count I of their initial complaint. Because res ipsa loquiter does not apply to establish gross negligence or wanton and willful misconduct, *Maiden v Rozwood,* 461 Mich 109, 127; 597 NW2d 817 (1999), plaintiffs have failed to meet their burden to survive a motion for summary disposition under MCR 2.116(C)(10) and summary disposition under MCR 2.116(C)(7) is also proper because defendants Schott and Chaney are immune and not exempt from immunity for tort liability under the GTLA. MCL 691.1407(1), (2)(c).

Plaintiffs have not satisfied the proprietary function test so as to survive summary disposition under MCR 2.116(C)(7) or shown that defendants Schott and Chaney were grossly negligent and therefore defendants are immune from tort liability. In addition, plaintiffs failed to satisfy the statutory notice requirement under the Court of Claims Act, and summary disposition was properly granted to defendants.

Affirmed.

/s/ David H. Sawyer
/s/ Deborah A. Servitto
/s/ Michael J. Kelly

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[2] In addition, plaintiffs point to the hospital records that note a "2 inch gas [sic]" on the horse's hip and contrast that with a picture of the horse's wound which they allege to be much larger, indicating a possible "cover-up" of the seriousness of the wound.